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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

13 ENOCH ADAMS, JR., LEROY ADAMS,  
14 ANDREW KOENIG, JERRY NORTON  
DAVID SWAN and JOSEPH SWAN,

Case No. A04-49 (JWS)

DECLARATION OF  
DR. MICHAEL KAVANAUGH

**Plaintiffs,**

V.

17 TECK COMINCO ALASKA INCORPORATED

Defendant.

19 NANA REGIONAL CORPORATION and  
20 NORTHWEST ARCTIC BOROUGH,

### Intervenors-Defendants.

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1 I, Michael Kavanaugh, declare:

2       1. I am over 18 years of age and not a party to this action. I have been retained by the  
3 plaintiffs' counsel to serve as an expert witness on the economic benefit Teck Cominco Alaska  
4 Incorporated ("Teck Cominco") gained from non-compliance with its NPDES permits and its  
5 ability to pay a penalty.

6       2. I submitted a list of my testimony since 1990 with my original expert report in 2004  
7 and with my updated expert report in 2008. This identification of my prior testimony at both trial  
8 and deposition is in my curriculum vitae, which was attached to, and a part of, each expert report.

9       3. In my original expert report, produced in December 2004, I estimated the benefit Teck  
10 Cominco gained from alleged violations at its Red Dog Mine. I am informed and believe that  
11 Teck Cominco is a wholly-owned subsidiary of Teck Cominco Limited. In the text of my report  
12 I referred to the parent company, Teck Cominco Limited, as the recipient of the gain (or  
13 economic benefit) much like someone would say a parent receives the gain given to a child. If  
14 there was a data gap in the financial material available on Teck Cominco, in the 2004 report I  
15 used information from Teck Cominco Limited to plug the gap.

16       4. The District Court determined that it was improper to refer to Teck Cominco's  
17 economic benefit as received by Teck Cominco Limited, and in my updated expert report of 2008  
18 I was careful not to use Teck Cominco Limited interchangeably with Teck Cominco, or to use  
19 any data at all from Teck Cominco Limited.

20       5. In updating my report, I read the Court's summary judgment decision (on TDS) and  
21 took into account the findings that it made as to liability. I extended my economic benefit  
22 estimate from August 2003 to June 2004, and included violations during the Arctic Grayling  
23 spawning season in 2005, 2006 and 2007. I did so because I believe this is what an update is  
24 supposed to do, that is, incorporate new information that is relevant to the decisions the Court  
25 must make.

26       6. In constructing an economic benefit analysis, most of the inputs are independent of the  
27 ownership structure of the company involved. The cost data has nothing to do with the parent or  
28 child company. The dates of violation used for calculating benefit have nothing to do with the

1 parent or child company. The measures of price change (inflation) have nothing to do with the  
2 parent or child. The taxes used have nothing to do with the parent or child because I used the  
3 statutory limits of U.S. and Alaska taxes in both analyses. In my examination of economic  
4 benefit I looked at the opportunity costs in two ways, the equity rate and the weighted average  
5 cost of capital (WACC). For the first of these, the equity rate, which I explicitly favored in my  
6 2004 report, has nothing to do with the parent or the child company. The second, WACC, is the  
7 one place in my 2004 report where I used Teck Cominco Limited data for the economic benefit  
8 analysis. All of the other parts of the economic benefit analysis, and its conclusions, are  
9 independent of the identity of the company and applied in my 2004 and 2008 reports to Teck  
10 Cominco Alaska Incorporated. My opinions in my 2004 expert report that refer to the equity cost  
11 of capital were not based on Teck Cominco Limited data, and pertained to Teck Cominco Alaska  
12 Incorporated in the 2004 report; my 2008 report simply updates that equity cost number, which  
13 still applies only to Teck Cominco Alaska Incorporated.

14 8. In my original 2004 report and my 2008 updated report I used the date of June 1, 1999  
15 to begin my *economic benefit* analysis.

16 9. In my 2004 report, I used 1999 as the beginning year for the *ability to pay* analysis. In  
17 my 2008 report, I used 1998 as the beginning date for the ability to pay analysis. This has the  
18 effect of making that analysis more conservative, as 1998 was a less than average year of  
19 performance for Teck Cominco. Using the same starting year of 1999 as in my 2004 report, and  
20 updating it to the present with 2004, 2005 and 2006 data, Teck Cominco Alaska has a 71%  
21 chance of being able to afford a fine of \$27 million. That is slightly higher than the 70% chance  
22 of paying a \$27 million fine that I found in my 2008 update, which used the 1998 data as well,  
23 demonstrating the conservatism of my approach.

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10. My actual data for the 2008 update, without the 1998 data, is below. This table is based solely on Teck Cominco Alaska Incorporated data.

Year	Reported (\$,000s)	Constant 2008 \$ (\$,000s)
1999	69,402	82,942
2000	71,917	84,262
2001	1,555	1,786
2002	77	87
2003	36,078	39,833
2004	167,411	181,211
2005	246,564	261,656
2006	751,561	781,924
Mean		179,213
Standard Deviation		259,488

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12<sup>th</sup> day of February at San Francisco, California. 

  
Dr. Michael Kavanaugh